In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THOMAS FRANKLIN, PLAIFTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 736

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

Comes the Solicitor-General on behalf of the United States and moves the court

1. That the appeal be dismissed because no question is presented whereon this court can take jurisdiction of the case; and

2. In the alternative, that the judgment of the Circuit Court be affirmed, because the question on which the jurisdiction of this court depends is so frivolous as not to need further argument.

STATEMENT OF THE CASE.

Three indictments were returned against plaintiff in error by the grand jury in the southern district of New York. In the first of said indictments he was

charged with the embezzlement of certain personal property of the cadets at the United States Military Academy, upon a government reservation, to wit, the West Point Military Reservation, in the southern district of New York in violation of section 5391, Revised Statutes, as amended by the act of July 7, 1898, and of sections 528 and 531 of the New York Penal Code.

In the second indictment he was charged with making and presenting to an officer of the army, for approval, false claims upon the Government of the United States for supplies furnished to the cadet mess at West Point, in violation of section 5438, Revised Statutes; and, in the third indictment, he was charged with making and presenting to an officer of the army, for approval and for payment, a false claim upon the United States War Department, and upon the treasurer of the United States Military Academy, in violation of section 5438, Revised Statutes.

Demurrers to the indictments were overruled and the three indictments were then consolidated. The first of said indictments contains six counts, in three of which plaintiff in error is charged with grand larceny in the second degree, under the New York Penal Code, and in the other three he is charged with embezzlement of the same funds, in violation of the New York Penal Code; but the first three of said counts were *nolle prossed*. The defendant thereupon pleaded guilty to all three of the indictments; but before judgment was pronounced he moved in arrest

of judgment, the grounds of his motion being as follows:

1. Because the said fourth, fifth, and sixth counts of the indictment against the said defendant for grand larceny under section 2, chapter 576, act of July 7, 1898, to and of which the defendant pleaded and was found guilty, do not, nor does any one of the said counts, charge a criminal offense under the laws of the United States.

2. Because the said section 2, chapter 576, of an act of Congress approved July 7, 1898, entitled "An act to protect the harbor defenses and fortifications constructed by the United States from malicious injury, and for other purposes," is unconstitutional and void.

3. Because by the Constitution and the laws of the United States this court here has no jurisdiction of the offense alleged to have been committed by this defendant in said fourth, fifth, and sixth counts of the said indictments, because he says the said section 2, chapter 576 of the said act of Congress approved July 7, 1898, confers upon this court here no jurisdiction of this cause, nor any legal power to hear, try, and determine the same, inasmuch as the punishment for the offense alleged in said indictment, and in each and every count thereof, when committed by the treasurer of the United States Military Academy, an officer of the Army of the United States, is provided for by section 1342, Revised Statutes of the United States; and inasmuch as, by the said Constitution and

laws, exclusive jurisdiction over said offense, when committed by a person subject to military jurisdiction, is vested in the properly constituted and authorized courts-martial of the United States.

4. Because the facts alleged in said counts under section 5438, Revised Statutes of the United States, do not, as alleged in said counts, or in any one of them, charge a criminal offense against the United States.

This motion was overruled by the court, and defendant was sentenced to serve a term of imprisonment of two and one-half years in the United States penitentiary at Atlanta; and, errors being assigned which raise the questions presented in the motion in arrest of judgment, the case was removed to this court by writ of error.

The statutes under which said indictments were found are as follows:

1. Section 2 of the act of July 7, 1898 (30 Stat., 717):

> That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction, in a circuit or district court of the United States for the dis-

trict in which the offense was committed, be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such state law shall affect any such prosecution.

2. Sections 528 and 531 of the Penal Code of New York:

SEC. 528. A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person—

1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of vaule of any kind; or,

2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money,

property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property and is guilty of larceny.

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SEC. 531. A person is guilty of grand larceny in the second degree who, under circumstances not amounting to grand larceny in the first degree, in any manner specified in this article, steals or unlawfully obtains or appropriates:

1. Property of the value of more than twenty-five dollars, but not exceeding five hundred dollars, in any manner whatever; or

2. Property of any value, by taking the same from the person of another; or

3. A record of a court or officer, or a writing, instrument, or record kept, filed, or deposited according to law, with, or in keeping of any public office or officer.

3. Section 5438, Revised Statutes, so far as it is applicable to these indictments:

Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudu-

> lent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry * * * every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years or fined not less than one thousand nor more than five thousand dollars.

It is insisted by plaintiff in error:

1. That under article 62, section 1342, Revised Statutes, which reads as follows:

> All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court,

a court-martial has exclusive jurisdiction of the offenses charged, inasmuch as plaintiff in error was an officer of the United States Army; and

2. That section 2 of the act of July 7, 1898, is unconstitutional; and it is upon these grounds that he insists that this court has jurisdiction.

ARGUMENT.

I.

1. No fair question exists as to the jurisdiction of the Circuit Court of the United States for the Southern District of New York over this case.

Article 62 of section 1342, Revised Statutes, does not purport to vest exclusive jurisdiction in courts-martial, and civil courts have concurrent jurisdiction over all offenses committed by a military officer which may be punished by a court-martial under the provisions of said article.

By the thirtieth section of the act of March 3, 1863 (12 Stat., 736), it is provided that in time of war, insurrection, or rebellion certain offenses, including murder, "shall be punishable by sentence of a court-martial or military commission when committed by persons who are in the military service of the United States and subject to the Articles of War, and punishment for such offenses shall never be less than those inflicted by the laws of the State, Territory, or district in which they may have been committed." And it was held by this court in *Coleman* v. *Tennessee* (97 U. S., 509, 514) that this statute did not confer upon courts-martial exclusive jurisdiction for the trial of the offenses mentioned, the court using the following language:

> With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention (to confer ex-

> clusive jurisdiction upon a court-martial) should be ascribed to Congress in the absence of clear and direct language to the contrary.

In *Grafton* v. *United States* (206 U. S., 333, 348), when holding that the judgment of a court-martial having jurisdiction to try an officer or soldier for a crime is entitled to the same finality and conclusiveness as the judgment of a civil court in cases within its jurisdiction, this court used the following language:

> While, however, the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law by an officer or soldier of the army within the limits of the territory in which he is serving, this jurisdiction is not exclusive but only concurrent with that of the civil courts. Of such offenses courts-martial may take cognizance under the sixty-second article of war, and if they first acquire jurisdiction, their judgments can not be disregarded by the civil courts for mere error or for any reason not affecting the jurisdiction of the military court.

The court here had under consideration the very article relied upon by plaintiff in error, and (as shown by the quotation) expressly declared that the jurisdiction of courts-martial is not exclusive,

The general rule is that the jurisdiction of civil courts is concurrent as to offenses triable before courts-martial.

> *United States* v. *Clark*, 71 Fed., 710.
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> 6 Op. A. G., 413, 419.
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> Opinion of the Attorney-General rendered October 20, 1909.

The difference in the language used in article 62, section 1342, Revised Statutes, and that used in section 5438, Revised Statutes, and in section 2 of the act of July 7, 1898, clearly shows that it was the intention of Congress that offenses committed in violation of the latter statute should be punished by the civil courts. By article 62 it is provided that the punishment shall be within the discretion of the court-martial, while under section 5438 the punishment is specifically fixed at hard labor for not less than one nor more than five years, or a fine not less than one thousand nor more than five thousand dollars; and by section 2 of the act of July 7, 1898, the punishment is the same as that provided by the state law for the same offense.

It is clear that if Congress had intended that the provisions of these statutes should be enforced solely by courts-martial it would not have defined with particularity the punishment to be inflicted in consequence of the offense, when it had, at the same time, left it entirely within the discretion of the court-martial to inflict such punishment as it might think proper when the offender was tried by such court.

Furthermore, by the express language of section 2 of the act of July 7, 1898, the conviction is required to be had "in a circuit or district court of the United States for the district in which the offense was committed;" and consequently this statute can be enforced only by the civil courts, and courts-martial have no jurisdiction over prosecutions thereunder.

Again, if courts-martial alone have jurisdiction to enforce these criminal statutes and others of like character, when violated by officers and soldiers, the same statute of limitations will not apply to offenses committed thereunder by such persons as applies to like offenses committed by all other persons. By article 103 of the Articles of War it is provided that no person shall be liable to be tried and punished by general court-martial for an offense which appears to have been committed more than two years before the issuing of the order for such trial, unless by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period.

Congress certainly did not intend to make it possible for army officers to escape from the penalty of prosecution when not brought within two years, when other individuals might be prosecuted within a much longer period of time.

2. No real constitutional question is here presented.

It is intimated that the second section of the act of July 7, 1898, is unconstitional because it undertook to delegate the power of legislation to the state legislatures. This contention is clearly untenable.

By section 3 of the act of March 3, 1825 (4 Stat., 115), it was provided:

> That, if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the United States, such offense

> shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated provide for the like offense when committed within the body of any county of such State.

In *United States* v. *Paul* (6 Pet., 141, 143) it was held by this court, speaking through Chief Justice Marshall, that the effect of this section was "limited to the laws of the several States in force at the time of its enactment;" and the effect of the holding of the court was that by this act Congress adopted for the government of the designated places, under the exclusive jurisdiction and control of the United States, the criminal laws then existing in the several States within which such places were situated, in so far as said laws were not displaced by specific laws which had been enacted by Congress. This case has been cited with approval in a number of subsequent cases, both State and Federal. (See 3 Rose's Notes, U. S. Reports, p. 239.)

Section 2 of the act of July 7, 1898, was enacted for precisely the same purpose, but the meaning is therein expressed with much more clearness than in the act of 1825. If in the *Paul* case it could be held that even when the act did not by its express terms limit its adoption of the laws of the several States to those existing at the time of the Federal acts' pas-

sage, a *fortiori* such is the effect of section 2 of the act of July 7, 1898, in which by express language Congress adopts such punishment as "the laws of the State in which such place is situated *now* provide for the like offense." There is, therefore, no delegation to the States of authority in any way to change the criminal laws applicable to places over which the United States has jurisdiction. The act had precisely the same effect as if all the criminal statutes of such States, creating offenses for which punishment had not been provided by congressional legislation, had been set forth *in extenso* in the body of the act.

It is not necessary, therefore, to consider whether Congress has power to provide that laws afterwards passed by state legislatures shall be effective in places within the jurisdiction of the United States.

II.

If this court can be said to have jurisdiction, yet the decision of the lower court is so manifestly right that the case should not be kept for further argument, and the judgment of the lower court should be affirmed.

In support of this branch of the motion, the foregoing argument and the cited authorities certainly suffice.

LLOYD W. BOWERS,
Solicitor-General.

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